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IN THE

Supreme Court of the United States

OCTOBER TERM—1949

98 Nos. 98 and 99 99

UNITED STATES OF AMERICA

v.

ERNESTINA G. FLEISCHMAN,

Petitioner.

UNITED STATES OF AMERICA

v.

HELEN R. BRYAN,

Petitioner.

PETITIONS FOR REHEARING

O. JOHN ROGGE,
BENEDICT WOLF,
Counsel for Petitioners.

MURRAY A. GORDON,
Of Counsel.

JUDICIAL PRINTING CO., INC., 82 Beekman St., N. Y.—BEekman 3-9084 5-6 182

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PETITIONS FOR REHEARING

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The petitioners herein pray for a rehearing and a reversal of the order of this Court dated May 8, 1950 wherein this Court reversed the judgments of the Court of Appeals for the District of Columbia, which latter Court had reversed the judgments of conviction of the petitioners herein and ordered a new trial. These petitions for rehearing are based upon substantial grounds available to petitioners although not previously presented.

I

The Court should consider and pass upon the contention of petitioners that the Trial Courts committed reversible errors in refusing petitioners' requests to discharge all government employees from the juries.

In their briefs to the Court of Appeals for the District of Columbia the petitioners herein urged that it was reversible error to refuse their request to discharge all government employees from the jury panels (see BR* 17, ff. 32; FR** 27A, 28A-29A). The Court of Appeals did not rule upon the foregoing contention for the reason that that Court concluded that the convictions had to be reversed on other grounds. Thereafter, the foregoing contention was again urged by the petitioners herein before this Court in petitioners' briefs and upon the oral argument. It was open for the petitioners to make this contention before this Court, although the petition for certiorari did not comprise the question of the propriety of the presence of government employees on the jury, since petitioners were authorized to present any argument tending to sustain the judgment of the Court of Appeals. *Walling* v. *Central Industries Co.*, 330 U. S. 545, 547; *Langnes* v. *Green*, 282 U. S. 531, 538. This Court, however, in reversing the judgments of the Court of Appeals did not reach or pass upon the question of the propriety of permitting government employees to serve on the juries which convicted petitioners, although this Court did reach and decide certain other questions which had not been passed upon by the Court of Appeals. The jury question, and those other questions which the Court stated that "we do not decide . . . at this time", are among the questions which

* The *Bryan* record is referred to as "BR" herein.
** The *Fleischman* record is referred to as "FR" herein.

will have to be now passed upon by the Court of Appeals upon the remand of these cases to that Court for the consideration of those matters not passed upon either by the Court of Appeals or the Supreme Court.

Petitioners urge, however, that, instead of requiring petitioners to re-argue the jury question before the Court of Appeals, awaiting decision thereon, and then re-presenting that issue to this Court, the instant petitions for rehearing be granted and that the jury question be set down for argument before the full Court, including Mr. Justice DOUGLAS. In the decisions by this Court in *Dennis* v. *United States*, 18 U. S. Law Week 4194, and *Morford* v. *United States*, 18 U. S. Law Week 4235, it has become plain that Mr. Chief Justice VINSON and Mr. Justices BURTON, REED and MINTON consider that government employees as a class need not necessarily be disqualified for bias from serving on a jury which has before it the question whether a witness has committed contempt of the House Committee on Un-American Activities. Mr. Justices FRANKFURTER, BLACK, JACKSON and DOUGLAS apparently consider that such bias must be imputed to government employees as a class in such a case. Mr. Justice CLARK, having disqualified himself from sitting in the instant cases, could not participate upon a rehearing of this case. Consequently, under the decisions of this Court, it would appear that if the jury questions in these causes were considered by the Court the judgment of the Court of Appeals for the District of Columbia would be affirmed because of the even division of the Justices. For this reason it is proper and appropriate that petitioners not be required to reargue the instant causes before the Court of Appeals when the Justices of this Court have already plainly manifested their positions on this issue which positions, if followed, would require an affirmance of the reversal of the convictions by the Court of Appeals.

II

It was error to sustain the rulings of the Trial Courts which took from the juries the material, disputed issue of fact whether a quorum of the House Committee was present at the time of the alleged defaults.

A

In the *Bryan* case this Court held that it was unnecessary for the prosecution to prove the presence of a quorum of the House Committee, at the time of the alleged contempt, in order to present a *prima facie* case of an offense under Section 192 of Title 2 of the United States Code. Section 192 makes illegal the willful failure "to give testimony or to produce papers upon any matter under inquiry before . . . any Committee of either House of Congress". The Court concedes, in accordance with its earlier decision in *Christoffel* v. *United States*, 338 U. S. 84, that if this phrase signified the failure "to give testimony or produce papers . . . before any Committee of either House of Congress", it would be necessary to prove the presence of a quorum as a material element of the offense; but the Court reads the words "before . . . any Committee of either House of Congress" to qualify the expression "any matter under inquiry" rather than the phrase "to give testimony or to produce papers".

The basic defect in the Court's construction of Section 192 is that under such a construction of Section 192 witnesses could be compelled not only "to give testimony or to produce papers" "before . . . any Committee of either House of Congress", but at any place and before any body or agency. The expression "before . . . any Committee of either House of Congress" must necessarily define and localize the place where witnesses must appear to testify and produce papers for otherwise the compulsory power

of committees of Congress is virtually unlimited as to place or location.

In any event, however, irrespective of the manner in which the offense is defined by the statute, the prosecutions of Bryan and Fleischman were predicated upon a default of certain identified and specific subpoenaes. No matter what the statute might require, if the subpoena is the instrument which has been disregarded the offense is described and defined by that instrument. And this Court assumed that the subpoenaes call for testimony before the House Committee *qua* Committee. Consequently, as the instant prosecutions were for a default of those subpoenaes, it necessarily follows that an essential element of the crime which must be proved by the prosecution is the presence of a quorum of the Committee at the time when the alleged defaults occurred.

B

The Court also ruled that, whatever right one prosecuted for testimony given by him as a witness before a Congressional committee may have to raise upon the trial for the first time the lack of a quorum where he did not raise the lack of a quorum before the Congressional committee, ". . . under the circumstances disclosed by this record a defense of a lack of quorum was not open to respondent". The "circumstances" in both causes which thus were construed to waive the rights of petitioners to the defense of the lack of a quorum was the failure of either petitioner to assert such a lack of quorum before the House Committee and, in the case of the defendant Bryan, the fact that she indicated that she was refusing to produce the books and records for reasons other than the absence of a quorum. Ordinarily this Court does not readily spell out a waiver of a right as fundamental as the right to raise as a defense that an agency, obstruction of which is a crime only when it is in existence *qua* agency of government, was not thus

in existence when obstructed. *Glasser* v. *United States*, 315 U. S. 60, 70; *Aetna Life Ins. Co.* v. *Kennedy*, 301 U. S. 389. Nor should such a waiver be readily implied with respect to testimony before Congressional committees for while there may be a great public interest in the right to compel testimony before a Congressional committee, there is as great a right or a greater right of all persons to be let alone in their private matters and affairs—a right which is clearly limited and impinged upon by the House Committee on Un-American Activities. Thus petitioners respectfully submit that it was error for this Court to spell out a waiver from the single circumstance in the *Fleischman* case that the lack of quorum was not raised before the Committee* and from the further circumstance, in the *Bryan* case, of the assertion of another ground for non-production of the books and records.** At the least, the waiver of a fundamental right requires that the party who has purportedly waived his rights does so with full knowledge of the rights which he is supposed to have waived. Certainly a witness before a Congressional committee who, as the petitioners here, were without the benefit of counsel or in any other assistance while before the Committee (see F. R. 146), and who, while before the Committee, were badgered and harassed and unaware of their rights, and who, further, as a matter of law, had no right to raise a point of quorum, may not be considered to have waived their rights to object to a lack of quorum. These peti-

* In *Christoffel* it was held that the mere failure to raise the lack of quorum at the time that the witness appeared before the Congressional committee is not a waiver of the right to raise the lack of quorum subsequently upon a criminal prosecution arising out of the witness' testimony. In the case of *Fleischman* the only act committed by her which might be deemed a waiver of her right to raise the lack of a quorum for the first time upon a criminal trial was the fact that she did not raise the point of quorum when she testified. Since this does not constitute a waiver under *Christoffel*, this Court, which apparently considers *Christoffel* to remain good law, was in error in reversing the Court of Appeals in *Fleischman*.

** Similarly, under *Christoffel*, this fact does not spell out a waiver. For if it can be said that Bryan would not have produced the records even in the presence of a quorum it can, by the same reasoning, be said that Christoffel would have given the same testimony even if a quorum had been present when he testified.

tioners were hardly in a position to know what constituted a quorum, whether a quorum was present, and whether they could raise objections to the lack of a quorum. Under such circumstances, it was error for this Court to conclude that these petitioners had waived their right to raise as a matter of defense the lack of a quorum.

CONCLUSION

It is respectfully prayed that these petitions for rehearing be granted and that upon such rehearing the orders of this Court herein be reversed.

Respectfully submitted,

ERNESTINA G. FLEISCHMAN,
HELEN R. BRYAN,
Petitioners.

O. JOHN ROGGE,
BENEDICT WOLF,
Counsel for Petitioners.

MURRAY A. GORDON,
Of Counsel.

Certificate

Counsel for petitioners certify that these petitions for rehearing are presented in good faith and not for delay, and that the petitions are restricted to the grounds above specified.

O. JOHN ROGGE,
Counsel for Petitioners.